

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

ORIGINAL

77-4033

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

HUDSON TRANSIT LINES, INC.,

Petitioner,

against

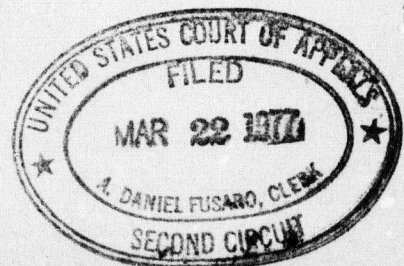
UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE
COMMISSION and MONSEY TRANSPORTATION CORP.,

Respondents.

ON PETITION FOR REVIEW OF ORDER OF THE INTERSTATE
COMMERCE COMMISSION

**BRIEF OF HUDSON TRANSIT LINES,
INC., PETITIONER**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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HUDSON TRANSIT LINES, INC.,

Petitioner,

-against-

No. 77-4033

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA and
MONSEY TRANSPORTATION CORP.,

Respondents.

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BRIEF FOR HUDSON TRANSIT LINES, INC.,
PETITIONER

This proceeding embraces an appeal by Hudson Transit Lines, Inc. (Hudson) or (Petitioner), pursuant to 28 U.S.C. Sections 1321 and 2341 et. seq. to review and vacate an Order of the Interstate Commerce Commission (Commission) of December 13, 1976 in a proceeding entitled Monsey Transportation Corp. - Contract Carrier Application, MC-141113 (R. 3)* This administratively final Order authorized the issuance to Monsey Transportation Corp. (Monsey) of a Certificate of Public Convenience and Necessity with regard to certain described operations as a common carrier of passengers by motor vehicle pursuant to Part II of the Interstate Commerce Act (49 U.S.C. 300 et. seq.)

*Reference is to the Appendix on Appeal

ISSUES

1. Did the Commission in finding that the proposed service constituted common carriage, as opposed to contract carriage, commit reversible error within the purview of the Administrative Procedure Act in that the applicant was unable to satisfy the statutory definition which provides that the term common carrier by motor vehicle means "any person which holds itself out to the general public...."(49 U.S.C. 303(a)(14)?

2. Did the Commission arbitrarily and capriciously apply the definitional standards and statutory provisions and depart from its own decisional precedents in concluding that the proposed service was not contract carriage as opposed to common carriage?

3. Did the Commission commit reversible error in granting Monsey authority as a common carrier, when, in fact, the applicant upon receipt of its Certificate of Public Convenience and Necessity will be in violation of law since its service will be confined to a specific segment of the population and will otherwise be in violation of the Interstate Commerce Act?

4. After having determined that the proposed service was common carriage and not contract carriage and that accordingly the applicant should be authorized to serve the general public, did the Commission commit reversible error in arbitrarily and capriciously failing to make the necessary underlying findings with regard to the impact which the newly constituted service would have on existing facilities which serve the general public?

Thus, this proceeding arises because the Commission in an arbitrary and capricious manner framed an Order which suits neither the requirements of Petitioner nor Monsey. If the Commission had granted Monsey the authority it applied for, namely contract carriage, all parties would have been satisfied and this appeal would not have been filed. This is merely another illustration of an administrative agency by administrative fiat framing an Order contrary to the needs of the parties and the public.

PROCEEDINGS BEFORE THE COMMISSION

A. The Application

By application filed July 3, 1975, Monsey requested a permit to operate as a contract carrier by motor vehicle pursuant to 49 U.S.C. 309 over regular routes, transporting passengers and their baggage in special and charter operations with Chassidic Jews and religious groups, organizations, congregations and synagogues of the Chassidic Jewish sect from described areas of New York, N.Y. to Monsey, N.Y. and return under contract with specified organizations. (R. 11)

B. The Hearing

Thereafter, the matter was assigned for public hearing at which time appearances were entered on behalf of three common

carriers of passengers, including Hudson, who had protested the application upon publication thereof in the Federal Register. At the hearing, discussion was held with regard to the fact that the application as published was not clear. The application within its contract carrier status was amended (R.104) so as to propose service between a described area in Monsey, N.Y. to described areas of the City of New York "under continuing contract with Jewish orthodox congregations and yeshivas located in the described Monsey area; with transportation restricted to members of said congregations and yeshivas." (R.106)

At the hearing, upon clarification of the amendments thereto, and upon assurance that the application was remaining as contract carriage, Hudson, together with the other common carrier protestants, withdrew their opposition. (R.108).

In order for the court to have a full understanding of the service proposed by the applicant^{and} the fact that the applicant is only proposing to serve under contract Jewish congregations and yeshivas and that the service will not be offered to the general public, there is set forth in Appendix A hereto a summary of the testimony presented by the witnesses.

C. Decision of the Administrative Law Judge

The Administrative Law Judge by his decision of April 30, 1976 recommended a grant of a permit to embrace such contract carrier operations. (R.8) The decision contained the following

findings of fact which evidenced contract carriage:

"The evidence shows that applicant will provide a unique and highly specialized service designed to meet the peculiar transportation needs of the Orthodox Jewish Community residing in the unincorporated hamlet of Monsey. These people constitute nearly the entire population of Monsey, and they absolutely require a bus service to and from their places of employment in New York City that will be consistent with their own distinctive religious beliefs and customs (such as, for example, the fact that the sexes insist upon being segregated on the bus, and the fact that all passengers must be returned to their homes before sundown on Friday and will not ride on Friday evening or Saturday), practices which are so incompatible with common carriage and with the normal bus operations of existing carriers that such carriers have declined to provide such a service, forcing hundreds of inhabitants of Monsey to resort to extraordinary measures to get to and from work." (R. 8)

In his decision, the Administrative Law Judge specifically found that the proposed service constituted contract carriage notwithstanding that the "total number of contracting organizations could reach a substantial figure." (R. 9) The Administrative Law Judge fully cognizant of the fact that under 49 U.S.C. 303(a) (15) a governing criteria with regard to the definition of contract carriage is the number of persons with whom the carrier will have contracts outstanding phrased his recommendations so that "the operation will necessarily retain the character of contract carriage..." since the service is "...wholly irreconcilable with common carriage." (R. 9)

The Administrative Law Judge did note that a contract carriage grant would not cause any effect upon existing carriers (R. 9) in that the applicant sought authority which would only allow it to serve a distinct and unique segment of the public. However, the authority recommended

by the Administrative Law Judge constituted a slight technical enlargement (geographical) of the authority originally applied for. Accordingly, the Administrative Law Judge recommended republication of the application in the Federal Register in order to apprise parties who theoretically might be affected by any enlargement of the application (R.9).

D. Order of Review Board No. 2, June 22, 1976

Although no exceptions were taken by any party to the Order of Administrative Law Judge, said Order was stayed pending further Order of the Commission of June 8, 1976. (R.7)

Thereafter, the Commission employee Review Board No. 2, by its Order of June 22, 1976, reversed the Administrative Law Judge's recommended grant of contract carrier authority and in lieu thereof authorized the applicant to transport as a common carrier by motor vehicle passengers and their baggage in special and charter operations beginning and ending at Monsey, N.Y. and extending to points in New York, N.Y. and Kings County, New York, with no other restrictions. (R.5) Significantly, the Order did not disturb the Administrative Law Judge's findings of fact.

The Review Board stated as follows in support of its Order:

"That if applicant were to enter into contract for transportation services with each of these organizations and perform services thereunder, it could not be considered as engaging

in transportation for a 'limited number of persons' as specified in the contract carrier definition of Section 203(a)(15) of the Interstate Commerce Act; that the operations proposed by the applicant and shown to be required by the supporting witnesses may be described more appropriately in terms of motor common carrier in special and charter operations; that the record amply shows the latter service to be required by the public convenience and necessity; and that said authority will be granted in lieu of the contract carriage recommended by the Administrative Law Judge." (R. 5)

Nowheres in its Order did the Review Board address the question that the applicant was not proposing to serve the general public notwithstanding that its Order specifically indicates and states that the applicant does not intend and will not be serving the general public. (R. 5)

Although the statute defines a common carrier by motor vehicle as one who serves the general public (49 U.S.C. 303(a)(14), the Review Board escaped the issue by simply stating that the operation "may be described more appropriately in terms of motor common carriage special and charter operations." (R. 5)

It is equally significant that the Order failed to consider the question addressed by the Administrative Law Judge that the proposed service is "wholly irreconcilable with common carriage" (R. 9) so that based upon decisional precedents a service of this unique and special character constitutes contract as opposed to common carriage.

E. Order of Interstate Commerce Commission, Division I,
Acting as an Appellate Division, dated December 13, 1976

Thereafter, Petitioner and Rockland Coaches, Inc., another protestant, filed separate petitions for reconsideration of the Order of June 22, 1976. (R. 22, 37)

Petitioner, within its pleading, specifically referred to the fact that the service as proposed will not be available to the general public and accordingly, as a matter of law, does not constitute common carriage. (R. 40) Petitioner further cited a series of cases wherein the Commission has held that contract carriage is involved where one is concerned with numerous shippers or passengers of a specific class or category, particularly where as in the cited cases the service involved "unusually specialized and unique" services. (R. 41)

Significantly, the National Bus Traffic Association (NBTA) also filed a petition for leave to intervene and tendered a petition for reconsideration with regard to the Order of June 22, 1976. On behalf of the regulated bus industry, NBTA argued that the decision would lead to a dangerous precedent whereby "If left undisturbed, the Order of the Review Board will allow special categories of persons, related on religious or ethnic grounds to lend support to a contract carrier application to serve their specialized transportation needs....." and then have the service translated to common carriage for the general public." (R.55)

It was further asserted that not only was the statutory definition being violated but further the provisions of Section 216(d) of the Interstate Commerce Act (49 U.S.C. 316(a) were being contravened since the statute provides as follows:

"It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce..... to subject any particular person.....to any unjust dis-

crimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In this connection, not only was the applicant providing a service where men and women were sitting separate and apart, but further, even if a member of the general public was to be permitted to board the applicant's vehicles, the fact was and is that said person would be subjected to the religious ceremonies and activities which were taking place on the vehicle.

Nevertheless, by Order dated December 13, 1976, the Commission, Division I, acting as an Appellate Division, denied the petitions for reconsideration by the protesting bus companies and denied NBTA leave to intervene. (R. 3) The petitions for reconsideration were denied for the cavalier reason that "the findings of Review Board No. 2 are in accordance with the evidence and the applicable law." (R.3)

This Order was the subject of a dissent by Commissioner McFarland. (R. 3)

F. Subsequent Petitions

Although the Order of December 13, 1976 was administratively final with regard to Petitioner, the General Rules of Practice of the Commission provide that a party may nevertheless file a petition for findings of issues of general transportation importance which petition would not stay any effective Order.

On January 4, 1977, Hudson filed such a petition wherein it raised questions as to whether or not the Commission on the basis of

racial and ethnical factors could grant any authority and particularly common as opposed to contract carriage; that consistent with the National Transportation Policy common carrier authority could not be granted in lieu of contract carrier authority on the basis of support confined to a single group; and reference was made to the decisional precedents establishing that this proceeding involved a specific class and not multiple persons and thus the discussion by the Review Board that the proposed service did not fit the definition of contract carriage was contrary to the applicable law. (R. 87)

Since the Order of December 13, 1976 was not administratively final as to NBTA, NBTA, on January 4, 1977, filed a petition for reconsideration of the prior Order denying its request for leave to intervene. (R. 90)

By Order dated January 17, 1977 the Commission denied Hudson's petition for the reason that in the judgment of the Commission no issue of general transportation importance was involved. (R. 2)

Thereafter, by Order of February 9, 1977, the petition for NBTA was denied on the grounds that "no sufficient or proper cause appeared for permitting Petitioner to participate in this proceeding, and no sufficient or proper cause otherwise exists for permitting intervention at this time." (R. 1)

G. Reply Pleadings of Monsey Transportation Corp.

The issues in this proceeding can be understood not only within the context of the evidence presented by applicant but .

by its pleadings wherein the applicant time and time again has repeatedly emphasized that it will not serve the general public but rather will only serve members of congregations and yeshivas under contract with such organizations. Indeed, Monsey misguidedly understands that the authority being granted to it does not actually enlarge the scope of the authority requested in the contract carrier application.

Thus, Monsey has asserted as follows:

- (a) "The decision and order of the Review Board, contrary to the contentions of the protestant, do not actually enlarge the scope of the authority granted to the applicant even though it will be denominated a common carrier." (R. 47, 48)
- (b) "The record and evidence conclusively established, as recognized by the Review Board, that the Applicant did not seek authority to provide service to the general public." (R. 48)
- (c) After discussing the fact that the applicant still desires only and solely to serve Jewish Orthodox congregations and yeshivas, the applicant stated as follows: "Therefore, to maintain definitional verity, the service proposed by the applicant was more properly denominated that of a common carrier in the sound exercise of discretion. (R. 48)
- (d) In its reading of the restrictions to the Appendix to the Review Board's Order, the applicant further states: "Further, the very limitations and restrictions imposed by the Appendix on the service authorized, conclusively eliminates the possibility as well as the probability that the applicant could, without risking revocation of its permit, expand its service to that of an ordinary, regular common carrier, serving the general public in competition with protestant or other common carriers similarly situated." (R. 83) However, these restrictions applied to the Administrative Law Judge's recommended grant of contract carrier authority and not the authorized grant of common carriage.

- (e) Further indicative of the fact that the applicant still believes that it will only be authorized to undertake the service it desires is the following statement: "It is noteworthy that the protestant offers no proof whatsoever that the applicant in truth, as claimed, proposes to transport passengers other than those to whom it is restricted by the decision and Order of the Review Board. (R.49)
- (f) "Whether passengers transported by the applicant are or are not members of the subject Jewish congregations and yeshivas is a readily ascertainable fact, subject to regulatory sanctions in the case of violation." (R.50)
- (g) "Finally, it is incomprehensible in logic and in law that because it is a nominal common carrier, Applicant will be obligated to serve the general public notwithstanding and in face of the Appendix restrictions, just because the authority granted is that of a common carriage." (R.50)

In short, applicant in writing has stated that notwithstanding that its certificate will be that of a common carrier of passengers it will not perform services as a common carrier for the reason that it intends only to serve members of the subject Jewish Orthodox congregations and yeshivas and that it does not desire to service the general public in competition with protestant or other common carriers." (R.49)

Thus, the issue before the court does not in actuality concern a dispute between Petitioner and Monsey but rather a dispute between Petitioner and the Commission with regard to the manner in which the Commission phrased the relief granted to Monsey. Obviously, Monsey misunderstands the statutory responsibilities and obligations it will have to undertake as a common carrier which it represents it will not fulfill since it will serve only the yeshivas and congregations. These statutory responsibilities and obligations preclude the proposed service from

qualifying as common carriage.

It is no answer for Monsey to assert that notwithstanding what the certificate authorizes it would only serve this limited community. Aside from the fact that the authority may be transferred to a third party, the certificate speaks for itself and authorizes the service therein described and requires that such be undertaken. A certificate may be revoked under 49 U.S.C. 312 only after hearing and notice in accordance with 49 U.S.C. 304(c) upon a showing of willful failure to comply with an Order issued after notice and hearings under 49 U.S.C. 304(c). In other words, at least two notices and hearing are required in which it would have to be shown that the certificate was procured by fraud to secure its revocation if the applicant was not to serve the general public. Accordingly, it is meaningless for Monsey to assert that if it serves members of the public other than the Chassidic community that its certificate will be revoked.

SPECIAL AND CHARTER OPERATIONS

The Commission authorized Monsey to operate as a common carrier by motor vehicle in transporting passengers "in special and charter operations" beginning and ending at Monsey, N.Y. and extending to points in New York and Kings County, New York.

Under the provisions of the Interstate Commerce Act, there are only three recognized types of common carrier passenger service (49 U.S.C. 307(a)):

- (1) The ordinary day to day scheduled regular route common carrier of passengers;
- (2) Charter operations which a group organized by someone other than a carrier sold the exclusive use of a vehicle;
- (3) Special operations, which are not defined but is a catch-all classification which may include almost anything but which is not charter or the usual operations of a regular route carrier. Adams-Common Carrier Application, 94 M.C.C. 290, 294-95. Michaud Bus Lines, Inc. - Extension 100 M.C.C. 432

Special and charter operations are words of art denoting aspects of common carriage service (Fordham v. United States, 41 F. Supp. 712 (D.C.N.Y., 1941)). Special and charter operations are separate and distinct from the other aspects of passenger common carrier service, namely regular route transportation (49 U.S.C. 307(a)).

A motor carrier who does not transport passengers over a regular route in point to point service but confines its operations to the transportation of passengers and their baggage in such operations as

group trips or tours beginning and ending at a specific point or within a described radius thereof and does not pick up or discharge passengers at any point outside of the origin territory or interchange passengers with any other carrier and does not sell individual tickets but serves only groups of parties under which the tickets are handled by one individual in the name of the group at a lump sum to be paid for the vehicle, the group acquiring the right to exclusive occupancy thereof, engages in charter service only as distinguished from special operations within the meaning of Section 207(a) of the Act (49 U.S.C. 307(a)). Denny - Extension - 19 M.C.C. 517, 518-519.

It has long been recognized that there is a definite statutory and regulatory distinction between charter and special operations. Charter service is characterized by the existence of a collective contract or charter for the exclusive use of a vehicle by a complete cohesive homogenous group. Conversely, special operations include the various kinds of operations which are neither charter service nor the usual operations of the ordinary regular route common carrier of passengers and involve the sale of tickets by the carrier to each individual passenger. Arrow Stage Lines, Inc. - Investigation and Revocation, 96 M.C.C. 572, 578; Passenger Transportation in Special Operations, 112 M.C.C. 160.

As has often been stated, from the beginning of motor carrier regulation, the term special operations has been a catch-all classification "which may include almost anything which is neither charter service... nor one of the usual operations of an ordinary regular route carrier of

passengers." Arrow Lines, Inc. v. Connecticut Limousine Service, Inc., 96 M.C.C. 1, 5, 6. It is also fundamental that special operations and regular service are not necessarily mutually exclusive. Greyhound Corp. - Extension, 82 M.C.C. 318, 319. Thus, regular commuter transportation may be classified as "special operations." It does not necessarily follow that because an operation may be appropriately designated as special that it may not also possess many of the characteristics of a ordinary regular route operation. Hudson Transit Lines, Inc. v. U.S., 314 F. Supp. 197 (D.C.N.J. 1970). (emphasis supplied)

In short, as a common carrier of passengers, the applicant, through special operations and thus without operating over fixed regular routes, would be in a position to transport all members of the public in Monsey and those who may travel from adjoining communities to Monsey, N.Y., on a per capita basis to New York, N.Y. notwithstanding that the support for this service was predicated on yeshivas and congregations and their members. By the same token, the applicant will be in a position to serve other groups in the Monsey area on a charter basis. The applicant will be able to perform all services of a common carrier of passengers other than strict regular route transportation. The applicant will thus be able to provide so called commuter services in areas which are served by protestants in regular route operations as commuter carriers. (Hudson Transit Lines, supra.)

As will hereinafter be discussed, the significance of this point is once the Commission converted the subject application from contract carriage to common carriage, the Commission failed to make a single finding whatsoever pertaining to the impact such service to the general public would have on the established certificated regular route operations of protestants. The Administrative Law Judge observed that these contract carrier restrictions would protect the general public services of protestants (R. 9). A common carrier must prove public convenience and necessity (49 U.S.C. 307) while a contract carrier need only prove consistency with the public interest. (49 U.S.C. 309)

The question posed is whether based upon support presented by a limited group which has unique and special requirements is an applicant to be granted common carriage status which creates a statutory right and obligation to duplicate the services made available by existing facilities? The fact that protestants have religious services on their buses and do not have men and women sitting together cannot give rise to a fundamental finding in a public convenience and necessity case with regard to adequacy of existing facilities in serving the general public and the impact the proposed service would have on their service to the general public. The court must bear in mind that by virtue of a grant of special and charter operations the applicant for all practical purposes is in a position to and must duplicate the services which Petitioner and

others are authorized to undertake notwithstanding that Applicant has re-
presented that it intends only to serve a limited segment of the community.

SCOPE OF JUDICIAL REVIEW

The Administrative Procedure Act provides that the reviewing court shall set aside agency actions and conclusions that are (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or (2) "unsupported by substantial evidence." Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and thus avoid a directed verdict. Richardson v. Perales, 402 U.S. 389 (1971); Consolo v. F.M.C., 383 U.S. 607(1966). "The substantiality of the record must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). 5 U.S.C. 706(2)(A) and (E). These two provisions of the Administrative Procedure Act are separate standards of review. Here, the Order of December 13, 1976 on its face violates the statutory provisions relating to common carriage and is otherwise unsupported by substantial evidence pertaining to service for the general public. Not a scintilla of evidence relating to the general public was presented in support of the applicant. The Commission through an administrative process of alchemy cannot convert such limited and parochial support to a finding of public need for service to the general public.

The Supreme Court has recently summarized the "arbitrary and capricious" standard of judicial review.

"Under the arbitrary and capricious" standards the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment...Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."....The agency must articulate a "rational connection between the facts found and the choice made."...While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transportation v. Arkansas Best Freight, 419 U.S. 281, 285 (1975).

The agency must also provide a rational and reasonable basis for deviating from its established policy.

"....(The) law does not permit an agency to grant to one person the right to do that which it denies another similarly situated. There may not be a rule for Monday and another for Tuesday, a rule for general application, but denied outright in a specific case." Mary Carter Paint Co. v. FTC, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J. concurring), rev'd on other grounds, 382 U.S. 46 (1965); Squaw Transit Co. v. United States, 402 F. Supp. 1278, 1287 (N.D. Okla. 1975).

The Interstate Commerce Act (49 U.S.C. 306(a)(1)) provides that a Certificate of Public Convenience and Necessity is required for any common carrier by motor vehicle subject to the Act to engage in any interstate operation.

Section 207(a) of the Interstate Commerce Act, 49 U.S.C. 307(a) provides in pertinent part that:

".....a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied...."

Nowhere does the Interstate Commerce Act define the term "public convenience and necessity." It is clear that Congress intended the Commission to have broad discretion in determining where "public convenience and necessity" lies.

Yet, in even these overlapping areas, the Commission's expertise is not sufficient to support a conclusion by itself without the application of proper law. ICC v. J-T Transport Co., 368 U.S. 81, 93 (1961). A reviewing court should uphold an Order of the Commission only where the Commission has applied the proper legal standards and reasoning in reaching its conclusion. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-169 (1952); Frozen Food Express v. United States, 280 F. Supp. 661, 663 (N.D. Tex. 1968). The Commission must support its ultimate conclusion with adequate findings based on the National Transportation Policy. Burlington Truck Lines, supra, 371 U.S. at 167-168; Schaffer Transportation Co. v. U.S., 355 U.S. 83, 87-92 (1957).

The Administrative Procedure Act requires that all agencies' decisions include "findings and conclusion, and the reasons or a basis therefor, on all material issues of fact, law, or discretion." 5 U.S.C. 557(c)(A). Thus, the Commission must state not only its ultimate findings of fact as to public convenience and necessity but also must articulate the basic factual findings underlying its ultimate conclusion. See K. Davis, Administrative Law Text 16.04 (3d ed. 1972); Atchison T. & S.F. Ry. v. United States, 295 U.S. 193, 201-202 (1935). And these subordinate findings must be adequate to support its ultimate conclusion; otherwise the order of the Commission is deemed arbitrary and capricious. Bell Lines, Inc. v. United States, 263 F. Supp. 40, 45 (S.D.W. Va. 19 67); Campbell Sixty-Six Express, Inc. v. United States, 258 F. Supp. 529, 535 (W.D. Mo. 1966); Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646, 650 (D.N.H. 1964).

At a minimum, the logical processes of the Commission in reaching its conclusion must be reasonably discernable, Bowman Transportation, supra, 419 U.S. at 286; American Iron & Steel Institute v. EPA, 526 F.2d 1027, 1077 (3rd Cir. 1975), and there must be sufficient findings or analysis to enable the reviewing court to ascertain whether the Commission properly applied the law and to justify the choice that the Commission made, Burlington Truck Lines, supra 371 U.S. at 167; Frozen Food Express (II), 280 F. Supp. at 663.

Such reasoning is absent, where, as here, there is no evidence or finding that the existing common carriers are not adequately serving the general public. Aside from the fact that the statutory definition of common carriage was not complied with, it was incumbent upon the Commission in converting the service from contract to common carriage to take into consideration the fundamental difference in the service authorized and the fact that all parties were suddenly placed in a different position. As stated by the Supreme Court in Burlington Truck Lines, v. U.S., supra at 168 where it reversed the Commission:

"Here, the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carrier and the public. Nor did it articulate any rational connection between the facts found and the choice made."

In the case at bar, the Administrative Law Judge's findings of fact were adopted. But, of further significance adequacy of service to the general public is a basic ingredient in determining whether or not public convenience and necessity warrants a grant of common carrier authority. Lemmon Transport Co. v. U.S., 393 F. Supp. 838 (W.D.Va., 1975). The Commission arbitrarily failed to consider the consequences to protestants of the "two vastly different remedies."

I

THE STATUTORY DEFINITION OF COMMON CARRIAGE
HAS NOT BEEN SATISFIED

(a) A Certificate of Public Convenience and Necessity is granted to a common carrier by motor vehicle (49 U.S.C. 307). Accordingly,

the first and primary determination is whether or not the service as proposed meets the statutory definition of common carriage. Although the Commission lightly stated that the "operations proposed....may be described more appropriately in terms of motor common carrier special and charter operations" (R.5), the fact is that in no manner or form is the proposed service within the ambit of the statutory definition.

Section 203(a)(14) of the Interstate Commerce Act (49 U.S.C.

303(a)(14) defines a common carrier by motor vehicle as follows:

"The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicles in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes...." (emphasis supplied)

To say the least, not only does the record indicate that the proposed service is not designed or intended with respect to the general public, but the applicant emphatically emphasizes that it has no inten-

tion whatsoever to serve the general public. (Appendix A hereto)

Everything being equal, the Commission has thus sanctioned, approved and authorized an unlawful act, namely granting the common carrier status to a carrier who stipulates that it will not comply with the terms and conditions thereof.

It is hornbook law that:

"It has been said that a common carrier, generally, may be defined as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place for compensation offering his service to the public generally; that the distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently; that the dominant controlling factor in determining his status as one of a common carrier is his public profession of holding out by words or by course of conduct as to the service offered or performed. 9 AmJur, Carriers, Section 14.

A common carrier of passengers has been defined, generally, as one who undertakes to carry for hire all persons who may apply for passage, provided there is sufficient space or room available and there is no legal excuse for refusing." 10 AmJur, Carriers, Section 984.

This fundamental principle pertaining to service to the general public by a common carrier has been repeated in legion manner by the courts and codified in 49 U.S.C. 303(a)(14). Thus, in U.S. v. Contract Steel Carriers, 350 U.S. 409 (1956), it was stated that a common carrier is not under individual contracts or arrangements. A carrier which involves and serves the general public is a common carrier. Demtrion v. Edwards, 416 F. 2d 958 (1969).

As was stated in Rock Island Transit v. U.S., 90 F. Supp. 516 (D.C.N.D. Ill., 1949) rev'd on other grounds, 340 U.S. 419 (1951), a common carrier by motor vehicle within the scope of Section 203(a)(14) of the Interstate Commerce Act is defined as a motor carrier who undertakes to transport property or passengers of any class for the general public.

"A carrier is a common carrier if it holds itself out to the public as willing to carry all passengers for hire indiscriminately." Arrow Aviation, Inc. v. Moore, 216 F.2d. 488 (C.A. 8th 1959).

It has often been stated that "holding out" to the public is one of the most significant of the numerous characteristics which distinguish common from contract carriage. Pregler - Extension of Operations, 23 M.C.C. 691; Craig - Contract Carrier Application, 31 M.C.C. 705; Coldway Motor Carrier, 79 M.C.C. 171.

As stated in Decker Transportation Co., Inc. - Contract Carrier Application, 26 M.C.C. 47, 90 (1940):

"That applicant serves the general public and that is the controlling factor in determining its status as a carrier. We conclude that its operation was and is that of a common carrier."

It was early recognized:

"In determining whether or not an applicant for operating authority is a common or contract carrier, the Commission must rely upon the definitions of those terms as set forth in the Act rather than interpretations or application of State statutes. Citing 2 M.C.C. 127. The essential elements of the general character of his business and his holding out to the public. Where a carrier has not confined his service to specially selected shippers, but has held himself out to transport property for any shippers desiring to avail

themselves of his facilities, and, further, has at no time been bound by agreements the terms of which required him to accord to any shipper preferred position as against any other shipper or the general public, his operations have been those of a common carrier within the meaning of Section 203(a)(14) of the Act. Healzer - Common Carrier Application, 24 M.C.C. 99, 100-101."

The fundamental difference between common or contract motor transportation is the presence or absence of a holding out to serve the general public. Griffin Mobile Home Transporting Co. - Contract Carrier Application, 91 M.C.C. 801, 804, 805.

(b) The applicant as a common carrier may not under any circumstance whatsoever place any restrictions upon the service which it offers to the segment of the public which it proposes to serve. Thus, in Canny Trucking Co., Inc. - Common Carrier Application, 17 M.C.C. 559, 560, the Commission rejected a restriction where a carrier proposed to confine its common carrier services to a specific type of shipment. The Commission stated:

"Applicant, if granted a certificate, must serve all shippers indiscriminately. The stipulation, therefore, is inconsistent with the duties of applicant and will not be recognized as a valid limitation on any common-carrier authority granted herein." See also A.L. Kaufman Extension - 30 M.C.C. 517.

Where, as here, a carrier limits his operations to a particular class of traffic, the operations are not those of a common carrier.

Baningham Contract Carrier Application, 20 M.C.C. 606, 607.

The Commission failed to address the question that a common carrier has a statutory obligation under its certificate to serve the general public without discrimination. A.L. Kaufman - Extension of Operations - Toledo, Ohio, 30 M.C.C. 517, 518 (1941). Accordingly, how does the applicant intend to serve residents of Monsey or of neighboring communities who may travel to Monsey who are not Orthodox Jews; who do not desire religious services in transit; who do not desire study sessions in transit; who do not desire segregation of men and women? This question must be addressed in order to support a finding that the applicant is a common carrier by motor vehicle. The Commission failed as a matter of law to address the prerequisite preliminary question prior to determining that public convenience and necessity requires a proposed service, namely whether or not the statutory definition of common carriage has been fulfilled. Self-imposed restrictions are invalid and are contrary to the very concept of common carriage. Restrictions in Service by Motor Common Carriers, 111 M.C.C. 151, 170.

The Commission has refrained from issuing common carrier grants of authority which were restricted to the transportation of a particular type or class of passengers because they are impractical from a regulatory standpoint, being too difficult to police and they are inconsistent with the status and public calling of a common carrier. However, in order to meet situations where the evidence established a

need for transportation to a limited class of persons, it has granted contract carrier authority with appropriate restrictions. Applicant herein proposed to render a personalized service to meet a peculiar need of a particular class of passengers. The need for such service warrants a grant of contract carrier authority. Galpin & Millhouser Extension, 63 M.C.C. 769, 770; see also Suburban Transit Corp., *infra*.

There is not a scintilla of evidence to support a finding of common carriage in this proceeding. A judge would be mandated to direct a verdict on this issue. Accordingly, not only have the provisions of the Administrative Procedure Act been violated by the failure to support the findings by substantial evidence, but further the findings are per se contrary to law.

(c) Hudson respectfully submits that any relationship between the proposed service and the statutory obligations which the applicant would be required to fulfill as a common carrier by motor vehicle and the service proposed to be undertaken by the applicant are purely coincidental. It was reversible error for the Commission to state that the proposed operation "may be described more appropriately in terms of motor common carrier special and charter operations" after having erroneously found that the proposed service does not meet the statutory definition of contract carriage. Assuming that the proposed service does not meet the statutory definition of contract carriage, there is still no justification for concluding that the proposed service constitutes

common carriage. To be sure, the line of legal reasoning which applies must be the reverse, namely does the service constitute a holding out to the general public; if not, then questions pertaining to the definition of contract carriage as opposed to common carriage must be addressed. This statutory guidepost contained in the definition of contract carriage which by statutory reference excludes therefrom common carrier transportation. (49 U.S.C. 303(a)(15)). It is for this reason that the Administrative Law Judge correctly found that the proposed service "will be wholly irreconcilable with common carriage" after discussing, among other things, the following facts of record:

"The evidence shows that applicant will provide a unique and highly specialized service designed to meet the peculiar transportation needs of the Orthodox Jewish Community residing in the unincorporated hamlet of Monsey. These people constitute nearly the entire population of Monsey, and they absolutely require a bus service to and from their places of employment in New York City that will be consistent with their own distinctive religious beliefs and customs (such as, for example, the fact that the sexes insist upon being segregated on the bus, and the fact that all passengers must be returned to their homes before sundown on Friday and will not ride on Friday evening or Saturday), practices which are so incompatible with common carriage and with the normal bus operations of existing carriers that such carriers have declined to provide such a service, forcing hundreds of inhabitants of Monsey to resort to extraordinary measures to get to and from work." (R. 8)

The Administrative Law Judge stated that the applicant "will provide a unique and highly specialized service designed to meet the peculiar transportation needs of the Orthodox Jewish community residing in the unincorporated hamlet of Monsey." These findings were adopted

and not reversed by the Commission. Thus, among other aspects of the proposed service would be that religious services and study programs would take place in transit; sexes would be segregated on the bus; the transportation would not conflict with the passengers' Sabbath observances. The applicant contemplated making available its "synagogue on wheels" service under contract with the congregations within the community. (Appendix A)

(d) Parenthetically, it should be noted that the Commission has failed to recognize the fundamental distinction with regard to serving the general public as a carrier of passengers as opposed to a carrier of property. Thus, a common carrier of property which seeks to transport only a given commodity or group of commodities will receive a Certificate of Public Convenience and Necessity confining it to such commodities, but nevertheless, it must serve all members of the general public who require its services with regard to these commodities. Classification of Motor Carriers of Property, 2 M.C.C. 703; U.S. v. Carolina Freight Carriers, 315 U.S. 475.

However, with regard to passenger transportation there is and can be no such distinction. The common carrier cannot state that it will only transport black persons, tall people, redheads, etc. To be sure, the Commission has promulgated regulations designed and intended to preclude such discriminatory practices. (49 CFR 1055); Discrimination - Interstate Motor Carriers of Passengers, 86 M.C.C. 743, 752; sustained

201 F. Supp. 813, per curiam 371 U.S. 9.

But, yet, here the Commission has concluded that the service proposed constitutes common carriage notwithstanding that the applicant in its testimony and in its pleadings specifically states that its services are designed and intended and will be restricted to members of the Jewish Orthodox congregations and yeshivas. This is not the general public and, as indicated hereafter, such service can only be afforded as a contract carrier by motor vehicle. Self-imposed limitations are invalid and are contrary to the very concept of common carriage. Restrictions in Service by Motor Common Carriers, 111 M.C.C. 151, 170. Under Section 203(a)(14) a common carrier by motor vehicle is defined as "a person which holds itself out to the general public... Any restriction which would limit transportation to persons of a particular race appears to be unreasonable and impracticable." Jordan Common Carrier Application, 51 M.C.C. 388, 389-390.

(e) It was never contemplated by the statute, as recognized by the Review Board, that special categories of persons related on religious or ethnic grounds, could lend support to a contract carrier application to serve their specialized transportation needs but on the basis of such limited evidence an applicant could secure authority to serve the general public as a common carrier. Such a grant particularly without a statutory showing of public convenience and necessity pertaining to the implications surrounding the grant of

authority to serve the general public as opposed to the limited segment thereof is contrary to law and violates the Administrative Procedure Act in that there are no underlying findings with regard to this fundamental issue. The findings in this proceeding are all predicated upon the need for this specialized type of service. However, the applicant is now authorized to transport all members of the public in the Monsey area in special and chartered operations and not merely the group for whom it sought authority to serve under contract. Hence, the applicant is now in a lawful position, among other common carrier services, to undertake a commuter service in special operations serving all members of the general public, whether or not they are presently traveling on the regular route buses of the protestants.

It is fundamental that under the Administrative Procedure Act the Commission at the very least should have considered the impact and significance of an unrestricted grant of authority. Perhaps the situation can best be illustrated by considering the fact that such carriers as Greyhound and Trailways operate in regular route service between New York, N.Y. and Philadelphia. According to the decision of the Commission in this proceeding, applicant whose support is confined to congregations of a given faith in the City of New York in applying for contract carrier authority to service the unique needs of that group would receive a Certificate of Public Convenience and Necessity to serve the general public in special operations or charter operations

between New York City and Philadelphia and thus be in a position to duplicate the service of Greyhound and Trailways in serving the general public. No longer would the party be confined to the service proposed and for which support was confined. In essence the Order of the Review Board arbitrarily and capriciously allows special categories of persons, related on religious or ethnic grounds to secure authority to serve the general public. The Commission may not on the basis of racial and ethnic factors grant unrestricted common carriage authority. Shippers Truck Service, Inc. 19 States, 125 M.C.C. 329. The only evidence here presented pertained to religious transportation requirements. Such evidence forecloses a grant of a Certificate of Public Convenience and Necessity. Since the service as proposed does not meet the statutory definitions of a common carrier, there is no basis to grant a certificate.

(f) With regard to the obligations of a common carrier, it is quite clear that the applicant cannot and does not propose to meet the statutory obligations. From the testimony of the witnesses it has been shown that a significant aspect of the transportation needs of these members of the various congregations and yeshivas is an ability while traveling to pray and study as their beliefs and traditions dictate. One of these religious traditions involves seating of women and men separately. It is respectfully submitted that contrary to law such separate seating unless conducted by a contract carrier as opposed

to a common carrier is sex discrimination, and is discriminatory, prejudicial and disadvantageous for other members of the general public to be subjected to such practices in transit. Section 216(d) of the Interstate Commerce Act 49 U.S.C. 316(d) reads in pertinent part as follows:

"It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce.... to subject any particular person...to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever...."

Consistent therewith, the regulations of the Interstate Commerce Commission, 49 CFR Section 1055.1, prohibit a motor common carrier of passengers from operating "a motor vehicle in interstate or foreign commerce on which the seating of passengers is based upon race, color, creed or national distinction." Although it may be argued that the regulations do not embrace sex discrimination, it is respectfully submitted that such activity is of a discriminatory nature and may not be undertaken in service as a common carrier of passengers. Is a woman who is not an observing Orthodox Jew and boards the bus to be subject to such a segregated seating arrangement. The assignment of seats in such a manner constitutes unjust discrimination and undue and unreasonable prejudice and disadvantage. Keys v. Carolina Coach Co., 64 M.C.C. 769, 772. In Keys, the Commission held that a traveler is entitled to be free of the annoyances which inevitably accompany such practices.

In essence, the applicant admits that it will be embargoing all other members of the public. Except for emergency conditions, this is totally inconsistent with the applicant's statutory obligations as a common carrier by motor vehicle. American v. Director General, 77 I.C.C. 52; Powell-Meyers v. St. Louis, 45 I.C.C. 595; Butterick v. Alco, 51 M.C.C. 830; Montgomery Ward v. Northern Pacific Transportation, 128 F. Supp. 475 (D.C. Ore. 1953). In this connection, in related situations, the Commission has held that common carriers may not bargain away through labor contract provisions their statutory obligations to serve the general public. Galveston Truck Line Corp. v. ADA Motor Lines, Inc., 73 M.C.C. 617, 625, 626. The duty to serve the general public is an absolute one and because a secondary boycott which obstructs the interlining of shipments deprives the public of an existing service it does not follow that existence of such a boycott may constitute a public need for a proposed transportation service as opposed to the institution of enforcement proceedings by the Commission. Nebraska Short Line Carriers, Inc., 79 M.C.C. 599, 612, 194 F.Supp. (D.C. Ill. 1961) rev'd 371 U.S. 156 (1962). Even if a member of the general public would be permitted on the bus he would be subject to undue and unreasonable prejudice and disadvantage and discrimination while traveling as a passenger by the applicant. Such person may not be interested in prayer sessions and other religious observances occurring while the vehicle is traveling in transit. Such practices in tran-

sit are the equivalent of an embargo and cannot be sanctioned under the guise of common carriage.

Lastly, the court should not overlook the fact that the certificate which will issue will contain the standard language and provides that: "the holder thereof shall render reasonably continuous and adequate service to the public." The applicant, consistent with the evidence it has presented, unequivocally acknowledges that it will not be serving the public but rather only a limited segment thereof.

II

THE PROPOSED SERVICE CONSTITUTES CONTRACT CARRIAGE

(a) Section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15) defines a contract carrier as follows:

"The term contract carrier by motor vehicle means any person which engages in transportation by motor vehicles of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph 14 and the exception therein), under continuing contracts with one person or limited number of persons either (a) for the furnishing of transportation services through assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

As indicated, the statutory test is two-fold and as here relevant, we are concerned with the latter test, namely "for the furnishing of transportation services designed to meet the distinct need of each individual customer."

The problem which has arisen, however, is that the statutory definition speaks of "continuing contracts with one person or limited number of persons." Section 203(a)(1)(49 U.S.C. 303(a)(1)) defines the term person as "any individual, firm, co-partnership, corporation, company, association or joint stock association."

Prior to determining whether the applicant, under a grant of authority in this proceeding, would be serving a limited number of persons, it is necessary to consider the legislative history surrounding Section 203(a)(15) of the Act (49 U.S.C. 303(a)(15)).

Before the 1957 amendments to the Act, Section 203(a)(15) as enacted in 1940 defined a contract carrier as any person which under individual contracts or agreements engages in the transportation.... by motor vehicle of passengers or property in interstate or foreign commerce for compensation. In applying this statutory definition, the Commission over many years attempted on its own initiative to limit the number of contracts with which a contract carrier could enter. However, in United States, v. Contract Steel Carriers, Inc., 350 U.S. 409 (1956) the Supreme Court held that the Commission had no power to limit the number of contracts.

As a result of said decision, the Commission in its semi-annual report recommended legislation which would clearly state the nature of the services which could be provided by a contract carrier and

would limit those services to be performed for only one person or limited number of persons.

This was accomplished by the passage of the legislation which resulted in Section 203(a)(15) in its present form. It is worth noting that in considering the wording of this section, Congress recognized that the Commission would be given discretion in determining what constituted a limited number of persons. Thus, during the hearings before the Senate Committee on interstate and foreign commerce, Owen Clarke, Chairman of the Interstate Commerce Commission, testified that a concept of a "limited number of persons" would vary and that he believed that the arbitrary setting of a fixed number would be unwise. Senate Committee on Interstate and Foreign Commerce: Surface Transportation - Scope of Authority of I.C.C. (1957-P.35).

Commission decisions have subsequently held that a carrier normally will not be considered as serving a "limited number of persons" if it enters into contracts with more than 6 or 8 persons. Umtuhn Trucking Co. - Extension - Phosphatic Feed Supplements, 91 M.C.C. 691, 693-94.

(b) The term "limited number" is a relative term without any particular significance unless compared to the overall operations of an applicant. Some factors which have been considered in determining whether a carrier serves a limited number of persons are the different types of commodities transported, the number of permits under

which a carrier operates, the territory in which the operation is conducted, the similarity of the service of the carrier performed under its effective continuing contracts, the degree of specialization required by the nature of the business of the shippers involved and the historical manner in which the business has grown and developed. Cardinale Trucking Corp. - Extension - Centralville, N.J. 100 M.C.C. 126, 130; Pram Trucking Co., Inc. - Extension - New Brunswick, N.J., 117 M.C.C. 38, 45. Thus, a carrier generally will not be considered as serving a limited number of persons if it serves more than 6 or 8 contracting persons, but an exception to this rule occurs which was recognized by the Administrative Law Judge, when the carrier proposes to provide a specialized service for a clearly definable class of shippers. The rationale for this exception is found in Section 209(b) of the Act, which empowers the Commission to specify "such terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service as may be necessary to assure that the business is that of a contract carrier...."

(c) The concept of class of shippers was first articulated in Armored Service Co., Inc., 77 M.C.C. 433 (1958) in which the respondent carriers transported money securities and other related types of commodities for banks, department stores, and other similar businesses. Carriers served from 7 to 314 shippers. The Commission, however,

at page 439 determined that the respondents qualified as contract carriers under Section 203(a)(15) because they performed an unusual and highly specialized service confined to a limited class of customers so that respondents properly can be considered as serving a limited number of persons. The service involved the use of armored cars which were manned by crews trained in the use of firearms. The multiple shippers thus were considered as a class because all who required this specialized service, in the same manner as supporting congregations, constituted in and of themselves a specialized class.

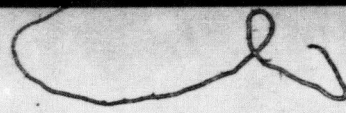
This finding was differentiated and discussed further in Storch Trucking Company, Inc., Conversion Proceeding, 82 M.C.C. 777, 781 (1960), where it was said:

"It was there (Armored Motor Service) held that 'a limited number of persons' as specified in the definition of a contract carrier does not necessarily mean an arbitrary figure which must be constant and not exceeded; but rather it is a figure determined after consideration of the factors and circumstances surrounding a particular operation or type of motor-carrier service. Some of the factors to be considered are the different types of commodities transported, the number of permits held by the carrier, the territory in which the operations are conducted, the degree of specialization required by the nature of the business of the shippers involved, and the degree of similarity in the services the carrier performs under its effective continuing contracts." (Emphasis supplied)

In Storch, the carrier had 46 contracts and was negotiating new ones at the time the Commission instituted the proceeding to determine Storch's proper status as a contract carrier. The facts found were such as to

cause the Commission to find that the carrier was holding itself out to the general public and was intending to operate as a common carrier. However, the specialized nature of the service to be provided by Monsey Transportation Corp. to a class of persons; i.e., special provisions for religious activity aboard the bus while underway and for separate seating of men and women, brings the instant application well within the guidelines of Armored Motor Service and the cases following that decision.

The class of shipper concept was further refined in Armored Carrier Corp. - Extension - 92 M.C.C. 336 where it was pointed out that the limited number of persons requirement can be satisfied by limitation of service to a class of persons only in those situations where the service involved was unusually specialized and unique. In other cases like reasoning has applied. Lane & Kaplan, Extension - New Jersey, 78 M.C.C. 547 wherein the Commission was concerned with applicant's serving 119 theater operators in the transportation of film. So too, in Howell Trucking Co. - Extension - Secaucus, 86 M.C.C. 646, it was decided that the supporting shippers in a highly specialized retail food delivery service constituted a single class, and that the applicant performing such services would satisfy Section 203(a)(15). Similarly, in S. Klein Trucking Corp. - Contract Carrier Application, 89 M.C.C. 53, the applicant was granted contract carrier rights to serve 72 subsidiary corporations of a department store. The fact that all of the entities were engaged in shipping department store merchandise aided their being considered a class.



The subject was clearly discussed in Crete Car Corp. - Maremont Contractors - Auto Parts, 117 M.C.C. 634, which addressed the question of whether numerous parties constitute a class of persons so that service performed for them will be considered service performed for a limited number of persons.

"In light of the Commission's past decisions in this area, we believe that the following factors should be considered in determining whether numerous shippers, operators, subsidiaries of a single parent company, should be considered as a class and thus properly constituting, in effect a single category for determination of a "limited number of persons" within the meaning of Section 203(a)(15) of the Act:

- (1) The different types of commodities transported,
- (2) The territory in which the operation is conducted,
- (3) The peculiar services provided by the carrier,
- (4) The similarity in the services performed for the various shipper companies,
- (5) The corporate nature of the affiliated companies, and
- (6) The economic objectives and benefits which the contract carrier by the 1957 contract carriage legislation sought to achieve."

(d) Palpably, we are concerned with a single class of shippers who for purposes of passenger terminology are contracting organizations. This issue was clearly addressed by the Administrative Law Judge who specifically recognized that upon close examination that the "operation will necessarily retain the character of contract carriage and will be

wholly irreconcilable with common carriage." (R.9) The Administrative Law Judge clearly recognized that we have a distinct class of organizations involved, regardless of the number thereof. He also recognized that we were not concerned with common carriage under any circumstance. Accordingly, he attempted to frame the Order in such a manner as to assure that supporting organizations would have available the lawful service within the structures of the Interstate Commerce Act. (R.9)

He therefore amended the application so as to assure that it would be consistent with the statutory mandate and thus limited the proposed service to "under continuing contracts with Jewish organizations and yeshivas located in the described Monsey area; with transportation restricted to members of said congregations and yeshivas." (R.9)

Nevertheless, in an arbitrary and capricious manner and in total disregard to the decisional precedents, the Review Board reversed the Administrative Law Judge's determination and concluded that the applicant could not be considered as engaging in transportation for a limited number of persons as specified in the contract carrier definition of Section 203(a)(15) of the Interstate Commerce Act. (R.5) Significantly, it should be emphasized that the Review Board did not in any manner or form address the decisional precedents above cited nor did they consider the class concept discussed in Section 209 of the Act. Significantly, the Administrative Law Judge was fully cognizant of the fact that the proposed

service did not involve service for the "general public." The Review Board failed to consider this issue and thus so framed the proposed grant of authority in such a manner that upon receipt thereof the applicant if it was to conduct this service which it proposed would be in violation of its own certificate in that it would not be serving the general public and would be providing a service in a discriminatory and preferential manner.

(e) The error of the Review Board in taking an unduly narrow view of Section 203(a)(15) is further revealed by the following discussions of two similar cases in Suburban Transit Corp. -Contract Carrier Application, 106 M.C.C. 763, 772 (1968):

"This brings us to the nature of the proposed service and the number of shippers to be served. In Shores and Brown Common Carrier Application, 26 M.C.C. 243, the transportation of groups of hotel patrons was found to be common carriage. In contrast, in Shepherd Bus Service, Inc., Contract Carrier Application, 81 M.C.C. 47, the transportation of groups of persons 21 years of age or less under contract with four designated service/religious organizations was found to be contract carriage, and appropriate charter contract carrier authority was issued. The distinction is that the groups in the Shores and Brown case supra, were drawn for each trip from the public at large, whereas the groups in Shepherd were drawn from the membership of continuing associations themselves artificially narrowed by criteria related to their own purposes."

Clearly in light of Suburban and the

precedent holdings in Armored Motor Service and S. Klein Trucking, supra, the 32 congregations themselves may contract with applicant and yet not violate the "limited number of persons" criterion of Section 203(a)(15).

It is equally significant that it has been determined in Michigan Pickle Co. - Common Carrier Application - Passengers - 77 M.C.C. 549 that a class of shippers, such as farmer employees constitute "a limited number of shippers" as contemplated by the terms of Section 203(a)(15), and that the transportation of migrant workers proceeding to or returning from agriculture, pursuant to authority granted under Section 203(a)(22) and (a)(23) of the Act, is contract carriage.

Thus, in Pan American Motor Coaches - Extension - Migrant Workers, 99 M.C.C. 117, 122, the Commission specifically discussed the question as to whether or not there must be in force and effect a contract with regard to each and every shipper.

The Commission therein stated:

"It also was noted therein that while it is the Commission's practice to include in permits a restriction limiting contract carriers to service under contracts with named shippers, Section 209(b) of the Act does not require such a restriction to be imposed in all cases; that the unique characteristic of the commerce involved therein precluded the imposition of such a requirement in authorities pertaining to the transportation of migrant workers, i. d. at page 553. It is clear, therefore, that the service proposed by applicant meets the definition of contract carriage as set forth in Section 203(a)(15). This requires that the application be further evaluated in accordance with the standards of Section 209(b) of the Act."

The same principles are applicable herein.

Petitioner respectfully submits that this proceeding is no different from the decision before the Commission in Del-Val Coach, Inc. - Contract Carrier Application, 119 M.C.C. 570, 574, wherein an applicant was granted contract carrier authority to serve operators of certain apartment buildings, wherein within the passenger transportation context the Commission addressed the entire question of common carriage and limited number of persons. Although in Del-Val the Commission was concerned only with four contracting parties, it specifically recognized that the conclusion is appropriate that the definition of contract carriage is met where the carrier under appropriate circumstances contracts with a large number of shippers "all of whom are members of a limited and clearly defined class by some special circumstance of aspect of business activities and transportation requirements." The Commission further predicated its decision on finding that "certainly applicant does not propose to hold out service to the general public for its passengers will be limited to tenants of the apartment buildings with which it has contracts...."

Of even greater relevance was the finding in Del-Val with regard to the statutory definition that "although this is sufficient to complete compliance with the considered definition, it is additionally noted that applicant will satisfy a distinct need that it is not authorized to meet under its common carrier certificates." Surely, no less is true in the instant case where a "synagogue on wheels" is proposed. The

Del-Val decision is attached hereto as Appendix B.

III

THE COMMISSION'S ORDER IS NOT PREDICATED ON
PREREQUISITE UNDERLYING FINDINGS PERTAINING
TO PUBLIC CONVENIENCE AND NECESSITY

The Commission failed to consider the adequacy of existing service and the needs and requirements of protesting carriers, including Hudson with regard to special and charter operations on behalf of the general public. The matter was placed in issue by the Administrative Law Judge when he found that the grant of contract carriage authority would not affect protestants. (R.9)

However, with regard to the ultimate determination by the Commission of common carriage and the grant of special and charter operations no findings, let alone consideration, was given to the question of adequacy of service. It is elementary that the question of adequacy of service is a basic factor in determining whether or not public convenience and necessity should be found. Lemmon Transport Co. v. United States, 393 F. Supp. 838 (W.D. Va. 1975).

The issue is relevant to this proceeding, particularly in light of the fact that it was focused upon the Administrative Law Judge. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

Concededly, the Commission could conclude that the benefits of the competitive service proposed by the applicant outweigh the adequacy of existing motor carrier facilities. Bowman Transportation v. Arkansas Best Freight System, 419 U.S. 381 (1974). However, the decision by the

Commission failed to even address the question as to adequacy of existing common carrier services with regard to special and charter operations and the impact which the proposed service would have on said services in the nature of common carriage as opposed to contract carriage. The showing of inadequacy of existing services is a basic ingredient to a favorable determination of public convenience and necessity (Lemmon, supra.); Lester C. Newton Trucking Co., v. U.S., 264 F. Supp. 869, 885 (D. Del. 1967) aff'd per curiam 389 U.S. 30 (1967); Zuzich Truck Lines, Inv. v. U.S., 224 F. Supp. 457, 468 (D.C. Kan. 1963). Although inadequacy of service is a basic ingredient it is not the sole test. But, yet, the issue must be addressed in order for this court at the very minimum to understand the logical processes of the Commission in reaching its conclusion. These processes must be reasonably discernible and there must be sufficient findings or analysis to enable the reviewing court to ascertain whether the Commission properly applied the law and to justify the choice made by the Commission. American Iron & Steel Institute v. E.P.A., 526 F.2d 1027, 1047 (3d. Cir. 1975). As stated in Burlington Truck Lines, Inc., supra, 371 U.S. at 168:

"Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carrier and the public."

In the case at bar, there are no adequate subordinate findings pertaining to the scope of operations which the applicant would be authorized to undertake under special and charter operations since the question as to

whether or not with regard to the total ambit of special and charter operations are the services of existing carriers adequate was not addressed. There is no rational basis to analyze the finding of public convenience and necessity in this proceeding in light of the parochial support for this service within the context of the broad grant of authority.

At the very minimum, after the Administrative Law Judge had so framed his decision to take into consideration the parochial aspects thereof, it was incumbent upon the Commission to address the question as to whether or not on the basis of such evidence should the applicant be granted a certificate which would enable it in essence to totally duplicate the services of carriers who serve the general public?

Here, after extensive discussion on the record involving the Administrative Law Judge and all parties of record as to the framing of the appropriate authority requested by the applicant, protestants withdrew their opposition based upon the contract carrier concept. Protestants were thus never in a position to present evidence and in any event regardless of the evidence which might have been presented by protestants the question nevertheless remains as to whether or not based upon such limited evidence as presented by applicant is a finding of special and charter operations justified? To be sure, in no manner or form do protestants in their regular route operations undertake or make available the religious services and prayer sessions on their buses since such activities would violate the provisions of Section 216(d) (49 U.S.C. 316(d) of the Interstate Commerce Act.

In addressing the question of adequacy of existing services and the proposed service we are talking about apples and pears. It is for this reason that the Administrative Law Judge clearly recognized that the proposed service must not only as a matter of statutory definition but as a matter of policy be categorized as contract carriage. Otherwise, the statutory distinction between common and contract carriage is obliterated. The absence of findings as to the question of adequacy of service as common carriers as opposed to contract carrier services by existing facilities dictates remand of the proceeding.

In this connection, it must be understood in the statutory test with regard to common carriage is public convenience and necessity and the statutory test with regard to contract carriage is consistency with the public interest. This fundamental distinction exposes the fact that reversible error was committed by the Commission in failing to make the necessary underlying findings once it switched to the remedy granting the applicant special and charter operations.

CONCLUSION

Hudson respectfully submits that the Commission has arbitrarily and capriciously found the proposed service to constitute common carriage in contravention of the statutory definition as set forth in 49 U.S.C. 303(a)(14). To be sure, there is no finding that the service proposed will be offered to the general public. Rather, the findings of fact of the Ad-

ministrative Law Judge's evidence presented by the applicant and the pleadings by the applicant remain undisturbed on this point, namely that the proposed service will not be offered to the general public. Within this context, there is no discernible basis upon which this court can determine that the Commission did not act in an arbitrary and capricious manner. In the same sense that special operations are a catch-all category with regard to passenger service, so too, contract carrier service, by the exclusion from its definition of service found to constitute common carriage is also a catch-all provision designed and intended to embrace those regulated services which do not constitute common carriage. At the very minimum, the Commission should be required to abide by statutory definitions if not its own decisional precedents.

For the above reasons, it is respectfully requested that the Court of Appeals issue an order vacating and setting aside the Order of December 13, 1976 and remand the proceeding to the Commission in order that the Commission might have the opportunity to find that the proposed service constitutes contract carriage.

Respectfully submitted,

SAMUEL B. ZINDER, P.C.
Attorney for Petitioner
98 Cutter Mill Road
Great Neck, N.Y. 11021
(516) 482-0881

Dated: March 23, 1977

APPENDIX A

As part of this proof, Chaim Lunger, president of applicant corporation, gave evidence as follows:

1. He and his wife were the sole stockholders and officers of the corporation, which corporation was duly incorporated in the State of New York. (R. 109, 110)
2. Witness was a licensed bus driver and was then driving for a Jewish congregation in Rockland County. (R. 110)
3. The community has been established for 20 years, consists of members of this sect, has a goodly number of synagogues and Yeshivas (schools). (R. 112)
4. The residents work in the City of New York and in Brooklyn, N.Y., and travel to work in congregation buses, in car pools, and in minibuses or vans. (R. 113)
5. Witness seeks to consolidate this travel, to have one bus company serve the community, and the officers of the various religious organizations are prepared to contract with the witness for this service for which there is a need. (R. 114)
6. Proposed service differs from the ordinary in that men and women sit apart on the bus and there are special seats for prayer and study. (R. 116-117)
7. There are no intermediate stops, and no passengers are picked up outside of the origin area described in the amended application. (R. 116)
8. The community is predominantly made up of Hassidic Jews, the same passengers will make the round trip, with level ridership. (R. 117)
9. Approximately 32 congregations exist, with new synagogues or Yeshivas formed from time to time, the smallest about 30 people. (R. 118)
10. No service on Sabbath or on Sunday, return on Friday several hours prior to sundown. (R. 118)
11. Hours of operation--except Friday--depart between 7:00 and 9:00 A.M. and return between 3:00 and 6:00 P.M. (R. 119)

APPENDIX A (cont'd)

The next witness, Ronald Greenwald, a resident of Monsey, N.Y., testified to the following:

1. Has lived 7 years in Monsey, a community about 22 miles from New York City, most of whose inhabitants are Jews who left Brooklyn and the Bronx to settle there. (R.121)
2. Population of Orthodox Jews in Monsey is about 2,500 families; with birth rate of 4.5 (3 times U.S. average); most keep jobs in New York (R.121)
3. Hassidic Jews, in Monsey, without college training, have tradesmen jobs in New York City; i.e., sweaters, diamonds, or peddling. (R.122)
4. Many Orthodox Jews in Monsey are non-Hassidic, but all wish to maintain separate male-female seating and other religious beliefs of Hassidics. (R.122)
5. Travel to New York is by car pool and small buses of various congregations, adds 20-25 minutes travel time. (R.123)
6. None of regular bus companies come to Monsey, all are within 2-3 miles of Monsey, must take taxi or car pool to buses, difficult, but witness makes it every day. (R.123)
7. Service of applicant necessary, and will aid other Jews to obtain work. (R.123,124)
8. Applicant understands religious significance, the times they must meet, and when persons can pray on bus or leave after certain prayer. (R.124)
9. Separate seating of men and women is by design and not by order; each sex would take separate seats in natural manner due to religious custom and beliefs. (R.124,125)
10. Applicant is Orthodox Jew. (R.125)
11. Monsey has 32 congregations. A congregation requires quorum of 10 male Jews who meet to pray. (R.125)
12. Largest congregation in Monsey has 250 members. (R.126)

APPENDIX A (cont'd)

13. Congregations average 40-50, and 3 or 4 per year are formed; congregations begin with 12 or 13, while Yeshivas begin with about 50. (R.126)

The third witness, Jacob Bookson, also a resident of Monsey, N.Y., testified to the following:

1. He is an Orthodox Jew working in Brooklyn. (R.127)
2. Repeated previous witnesses' testimony about car pools and vans for various congregations. (R.128)
3. Great need for applicant's service. (R.128)
4. Monsey residents are basically Orthodox, with beliefs and customs of their own to which applicant will cater and replace the automobile travel. (R.128)
5. His congregation would contract with applicant. (R.129)

The next witness, Abraham Joseph, a resident of Monsey, N.Y., testified essentially as follows:

1. Has lived in Monsey 3 years; is Orthodox and adheres to Sabbath and all other Talmudic codes and ethics; congregation has 35-45 members, some of whom work in New York and travel by car, van, taxi, and infrequently by bus. (R.130-131)
2. Definite need for applicant's service exists; other fares are \$10.50 per day, needs less expensive transportation. (R.131-132)

The fifth witness was Moshe Wosner, also a resident of Monsey, N.Y. He testified to the following:

1. Witness is an Orthodox Jew, has lived in Monsey for 11 years; his answers would be the same to prior questions of other witnesses. (R.133-134)
2. There is great need for applicant's service; and his congregation would enter into contract with applicant. (R.134)

APPENDIX A (cont'd)

The applicant then took testimony from Gittie Herskowitz, a resident of Monsey for 21 years, who testified as follows:

1. Her parents are Orthodox Jews, as is the witness, and she follows the dictates and tenets of the faith. (R.135)
2. She is employed in Manhattan and travels there daily by car pool or bus. (R.135)
3. She thinks there is a need for applicant's service. (R.136)
4. She is not a member of a congregation or Yeshiva, but her father is a member. She goes to Yeshiva on High Holy Days. (R.136)

The last witness called by applicant, Yoel Lunger, a resident of Spring Valley, N.Y., testified essentially as follows:

1. He knows the Monsey area, visits there every few days, knows that religious people live in Monsey, and that there is a definite need for the service of applicant. (R.137)
2. His answers to the same questions put to other witnesses would be the same. (R.138)
3. His congregation would execute a contract with applicant. (R.138)
4. He is employed by a Yeshiva as a school bus driver, and is being asked by parents for rides on the school bus, but must refuse. Eighty percent of the parents would require bus service to New York City. (R.139)

Summarizing the abstract of testimony given by applicant's witnesses, the record essentially shows that:

- a. The Orthodox Jewish community of Monsey, N.Y., has a specialized requirement for transportation into New York City, in that the members wish to conduct prayer and study sessions aboard the buses

APPENDIX A (cont'd)

in accordance with their traditions and religious beliefs.
These traditions involve segregated seating by sex.

- b. The Orthodox Jewish community in Monsey makes up most of the local population, they are organized into about 32 congregations, and these groups all wish to contract with applicant to serve their transportation needs.

APPENDIX B

No. MC-136729 (Sub-No. 1)

**DEL-VAL COACH, INC., CONTRACT CARRIER
APPLICATION**

Decided February 7, 1974

Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of passengers, between points in a described portion of Camden County, N.J., on the one hand, and, on the other, Philadelphia, Pa., for four named "shippers," found to be consistent with the public interest and the national transportation policy. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Raymond A. Thistle, Jr., for applicant.

Richard A. McGrath for protestant.

REPORT OF THE COMMISSION

REVIEW BOARD NUMBER 2. MEMBERS

BOYLE, PARKER, AND EATON

BY THE BOARD:

The modified procedure has been allowed, and the matter has been assigned to the board for disposition.

By application filed September 22, 1972, Del-Val Coach, Inc., of Gloucester City, N.J., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of passengers, between Collingswood, N.J., and points within 10 miles of Collingswood, on the one hand, and, on the other, Philadelphia, Pa., under a continuing contract or contracts with Somerset House Apartments, Towers of Windsor Park Apartments, New Parkview Village Apartments, and Cherry Hill Apartments. The application is opposed by Transport of New Jersey, a motor common carrier of passengers.

One preliminary matter requires our attention at this point. Embraced in protestant's verified statement in opposition to the application is a request that the proceeding be set for oral hearing to allow greater exploration of the nature of, and circumstances

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DEL-VAL COACH, INC., CONTRACT CARRIER APPLICATION 571

surrounding, applicant's proposal. Protestant has failed to demonstrate that there are any pertinent matters of substance in dispute, such as would require oral hearing in the matter. It is our judgment that the present record is fully adequate for proper determination of the issues presented, and that, accordingly, protestant's request for oral hearing be, and it is hereby, denied.

Applicant engages largely in schoolbus operations using transit and suburban-type motor buses, and also holds interstate common carrier passenger authority to conduct charter operations (a) from Collingswood, N.J., and points within 10 miles thereof to a described area embracing parts of Pennsylvania (including Philadelphia) and Maryland, all of Delaware, and the District of Columbia, and return, and (b) from Philadelphia to points in New Jersey, and return. It proposes to assume operation, as a contract carrier, of the present private carriage bus services provided by certain high-rise apartment buildings in southern New Jersey to transport their tenants to and from Center City Philadelphia. This operation is currently being conducted by applicant under temporary authority.¹ Prior to the grant of temporary authority, although these apartment buildings called upon applicant with increasing frequency to operate trips when their own buses were disabled or their drivers unavailable, applicant was prevented under its charter authority from conducting these operations on any regular basis.² It admits that protestant provides general regular-route bus service throughout the area involved, but argues that protestant provides no service tailored to meet the particular needs of these apartments' residents. Applicant further points out that protestant would suffer no diversion of revenue if this application were granted, since these tenants have always made use of the existing free services operated in private carriage by the managements of their respective apartment buildings. Applicant maintains shop and garage facilities in Gloucester City and has available several modern, air-conditioned motor coaches, which are owned by an affiliate. An exhibit attached to applicant's verified statement shows equipment bearing the name of a particular apartment building sought to be served. Applicant's balance sheet as of September 30, 1972, reflects total assets of \$40,415, current assets of \$7,596, current liabilities of \$1,200, stockholder's equity of \$24,265. Its net income for the period ended September 30, 1972, was \$3,342. Applicant asserts that its financial situation would

¹Temporary authority was granted by order entered July 21, 1972, in No. MC-136729 TA.

²Compare *Alexandria B & W Transit Co. Contr Car Applic.* 78 M.C.C. 655 (1959), discussed below.

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enable it to obtain additional equipment sufficient to provide each contracting apartment building with a bus painted to its individual specifications. Spare buses would be available to be placarded appropriately for replacement service.

The application is supported individually by Somerset House Apartments and Towers of Windsor Park Apartments, each of Cherry Hill, N.J., New Parkview Village Apartments, of Collingswood, and Cherry Hill Apartments, also of Cherry Hill. Each seeks to discontinue its own private operation of free bus service to and from Philadelphia which it offers to its tenants and engage applicant under contract to perform these operations. Parkview was the first of the high-rise apartments in the Camden, N.J., vicinity to offer such free bus service to its tenants, and now uses two buses, carrying as many as 300 tenants a day each way. As the second such apartment development in that area, Cherry Hill Apartments indicates that it was encouraged by Parkview's success in maintaining a high occupancy rate to emulate the practice. The other two supporting apartment buildings state similar positions: Somerset indicates that it schedules shopping trips as well as commuter trips, and Windsor Park avers that it offers seven daily round trips at 1-hour intervals. It is generally advanced that protestant's regular-route public transportation services are not comparable to what would be offered under applicant's proposal, since applicant's operation would be without cost to the tenants, would provide service directly to and from the entrance to each apartment building, and would operate over a more convenient loop routing through Center City Philadelphia.

Protestant provides substantial regular-route passenger services in New Jersey and adjacent areas of New York, Pennsylvania, and Delaware, pursuant to operating authorities issued by this Commission. As pertinent it operates to and from Center City Philadelphia (a) over New Jersey Highway 38 passing near the Cherry Hill and Somerset Apartments, 17 to 18 trips in each direction Mondays through Fridays, and 10 to 11 such trips on Saturdays; (b) over Chapel Avenue to Cherry Hill Mall, in the vicinity of the Cherry Hill Apartments, generally half-hourly service midday Mondays through Saturdays and bihourly on Sundays, including certain additional morning and afternoon service, some of which is extended to the vicinity of the Towers of Windsor Apartments; and (c) over White Horse Pike passing by the Parkview Apartments, half-hourly midday service Mondays through Saturdays and hourly service on Sundays, plus frequent rush hour schedules.

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These latter services near the Parkview Apartments, in addition to providing direct service to and from Philadelphia, provide connections with the high-speed rail line operated between Philadelphia and certain New Jersey points by the Port Authority Transit Corp., of Camden, N.J., and providing a rapid transit and subway service with very frequent operating schedules.

TNJ asserts that its regular-route services as outlined provide an adequate service to residents of the supporting apartment buildings, and that it is also willing to make arrangements with apartment managers to provide specialized services. It argues that applicant's proposal truly constitutes a "new" service, since the present operations conducted by the apartment buildings themselves are not subject to economic regulation, having been held by the Commission to be exempt as proper private carriage. Protestant notes that applicant has not submitted copies of the proposed contracts under which it would operate, and questions whether the supporting apartments would be acting as brokers of the proposed transportation service. It points out that applicant does not apparently propose to provide service throughout the day (as is available on protestant's regular routes), but rather to concentrate on providing service during the peak traffic hours. It is further asserted that police regulations within Philadelphia would require applicant—as a for-hire carrier—to operate over the same downtown routing that is used by protestant and other carriers, and that no advantage could in fact be realized by applicant on this account. Finally, protestant queries whether the financial data submitted by applicant accurately reflect the results of operations under temporary authority.

In rebuttal, applicant points out that the service proposed will be "free of charge" to the passengers transported, since the rates under the contracts will be paid by the managements of the respective apartment buildings, the cost to the passengers (as tenants) thus being part of their rent. It reasserts that its direct bus service to and from the doors of the individual apartment buildings is entirely different from the regular-route services offered by protestant, whereby buses stop only on the street. Reliable service will be maintained through the assignment of exclusive buses to each apartment complex, each bus decorated with the apartment's name and colors. Applicant further indicates that it has been assured by officials in Philadelphia that it will receive the necessary permit to enable it to maintain the same Center City "loop" routing as has been heretofore used by the apartment buildings' own buses. None

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of the tenant-passengers, it is reasserted, is presently a regular user of protestant's service, and, therefore, applicant discounts the possibility of diversion of traffic from protestant. Applicant also explains, in regard to its financial data that the discrepancies noted by protestant result from the calculation of projected revenue on the basis of the full service proposed, whereas such had not yet been attained under temporary operations as of the date of the financial statements.

DISCUSSION AND CONCLUSIONS

Section 203(a)(15) of the Interstate Commerce Act defines a contract carrier by motor vehicle as one which engages in motor transportation under continuing contracts with one or a limited number of persons. The transportation to be furnished must also meet one of the following alternative tests: (a) the assignment of motor vehicles for a continuing period of time to the exclusive use of each individual customer or (b) a service designed to meet the distinct need of each person served. It is our conclusion, for the reasons hereinafter stated, but applicant's proposed operations are fully within the statutory definition of contract carriage.

Applicant proposes to operate under contract with four separate and distinct persons: i.e., the supporting apartment buildings. It has been held by the Commission that a proposal to serve as many as six contracting shippers constitutes a limited number of persons as contemplated by the statute—both for property and for passenger transportation. Compare *Umthun Trucking Co. Ext.—Phosphatic Feed Supplements*, 91 M.C.C. 691 (1962), and *Gray Line Scenic Tours, Inc., Contract Carrier Applic.*, 103 M.C.C. 807 (1967), respectively. Beyond this limit the concept of "a limited number of persons" must of necessity be a relative matter, and a contract carrier may in appropriate circumstances contract with a larger number of shippers, all of whom are members of a limited class clearly defined by some special circumstance or aspect of their business activity and transportation requirements; *Armored Carrier Corp. Extension—Vermont*, 102 M.C.C. 411, 417-421 (1956); *Lane and Kaplan Extension—New Jersey*, 78 M.C.C. 547, 549-552 (1958). Applying these considerations to applicant's proposal herein, and to the field of passenger transportation in general, we feel it is apparent that only a limited number of shippers is involved. Certainly

*It should be noted that the submission of copies of the proposed contracts is not an obligatory requirement in usual contract carrier applications.

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DEL-VAL COACH, INC., CONTRACT CARRIER APPLICATION 575

applicant does not propose to hold out service to the general public, for its passengers will be limited to tenants of the apartment buildings with which it has contracts, and all transportation charges will be paid by the contracting apartment buildings only. Inasmuch as the number of such apartment buildings naturally is substantially less than the overall population served by common carriers in the area, we are of the opinion that such apartment buildings are a clearly defined limited class of persons, and that applicant may properly operate as a contract carrier in serving members of that class.

The evidence of record further reveals both that applicant intends to assign or dedicate equipment to the exclusive use of each apartment building it serves and that it will provide a service designed to meet distinct needs demonstrated by each of these buildings. With regard to the first of these alternative criteria, applicant indicates that it will provide buses which will be permanently assigned to and painted to the individual specifications of each apartment building. Although this is sufficient to complete compliance with the considered definition, it is additionally noted that applicant will satisfy a distinct need that it is not authorized to meet under its common carrier certificates. That is, under charter authority a carrier may not conduct regularly scheduled operations such as are here proposed; *Alexandria, B. & W. Transit Co. Contr. Car. Applic.*, 78 M.C.C. 655, 663-666 (1959), reversed in part on a different aspect of the issue in *Alexandria, Barcroft and Washington Transit Company et al. v. United States*, 15 F.C.C. (CCH) 81 (1961) and 428 (1962). As noted in the court decisions last cited, a regular-route carrier such as protestant herein could provide a similar service, but only if limited to the authorized regular routes. All things considered, therefore, applicant's proposal could not properly be authorized as common carriage, and the conclusion is appropriate that the definition of contract carriage has been met.

Once it has been determined that the proposed operation qualifies as contract carriage, it is necessary to consider whether the issuance of a permit will be consistent with the public interest and the national transportation policy. Section 209(b) of the act requires that consideration be given the number of shippers to be served, the nature of the service proposed, the effect of a grant on the opposing carriers, the effect of a denial on applicant and the supporting shippers, and the changing character of the shippers' requirements. Weighing in balance all of these considerations, as set forth more specifically below, we are persuaded that the application should be granted.

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As discussed above, applicant here proposes to serve four "shippers," which we consider to qualify as a limited number in these circumstances. In comparison with the number of passengers who would pay fares in a common carrier commuter operation corresponding to that proposed, moreover, it is apparent that the number of "shippers" to be served is so substantially less than that which would be served by a common carrier as to constitute a significant showing under the first criterion.

Applicant's proposed service will be superior to that offered by protestant. Whereas, protestant's services to the various apartment buildings here involved apparently are limited to regular routes used as well by other passengers at bus stops all along these routes, applicant will operate an express service which may be expected to afford a faster running time as well as less crowded peakload conditions. As has also been pointed out, applicant will serve the apartment buildings with front door stops rather than requiring passengers to walk to regular bus stops on the nearby streets.

We are convinced that a grant of the authority sought herein will have no significant adverse effect on protestant. The traffic involved presently moves in private motorbus operations, not by protestant's service, and thus no revenue would be diverted from protestant's existing operations. Moreover, were the application to be denied, and were the apartment buildings to terminate their existing operations anyway, a large portion of the passengers could be expected to use private automobiles rather than resort to protestant's less convenient service. Thus we doubt seriously that protestant can properly claim a significant loss of potential ridership resulting from a grant of this application. Lastly, we observe that applicant's service will be offered principally during peak traffic hours. Although it is not of determining importance to this proceeding, we would take official notice of the usual experience of the mass transportation industry that increases in peak hour traffic actually result in a decrease in the overall efficiency of the transit service, since a large portion of the facilities needed to provide services required during the few morning and evening rush hours must lie idle during the remainder of the day. The institution of the operations proposed by applicant will leave protestant as the sole public transportation facility serving these apartment buildings during most midday hours, and whatever traffic it can attract from the tenants of the buildings at these times should act to protestant's benefit by increasing revenues with no significant corresponding increase in operating costs.

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A denial of the application would not have any considered adverse effect on applicant, since it is operating now only under temporary authority to serve these apartment buildings and thus would lose no traffic it has handled on a permanent basis. The supporting apartment buildings need to have special bus service such as that proposed available in order to attract tenants and remain competitive with other apartment buildings in the area. Denial of the application would effectively force them to continue their individual operations in private carriage, whereas, the use of applicant's service will provide them with the benefits of certain economies of scale.

Except as implied in some of the matters discussed above, the changing character of the "shippers'" requirements does not appear to be a significant factor herein.

In conformity with the policy expressed in the National Environmental Policy Act of 1969, it is appropriate for us at this point to discuss briefly the relationship of applicant's proposed operation to potential effects on the human environment, both with respect to the question of pollution levels and with respect to conservation of resources. The use of mass transportation instead of private automobiles in commuting to and from places of employment is recognized as a worthwhile goal in both the reduction of pollution levels and the conservation of energy. Applicant's proposal will offer to the tenants of the apartment buildings here involved a mode of transportation which is apparently reasonably competitive with the convenience afforded by the private automobile, but with a much lesser impact on the environment and less use of energy. The authorization of qualified applicants to perform services such as those proposed herein, in the absence of demonstrated adverse effect on existing carriers and in conformity with the criteria expressed in section 209(b) of the Interstate Commerce Act, is, in our opinion, in the public interest.

We have taken care to set forth in some detail in this report the significant factors which lead us to the conclusion that the authorization of the proposed service will be fully consistent with the public interest and the national transportation policy. We expect that future applications proposing similar services, if the evidence presented demonstrates a situation in reasonable conformity with the situation and considerations discussed in this report, should receive expeditious and favorable consideration in line with this Commission's statutory mandate "to promote safe, adequate, economical, and efficient service and foster sound economic

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conditions in transportation and among the several carriers *** to the end of developing, coordinating, and preserving a national transportation system *** adequate to meet the needs of the commerce of the United States [.]”

Upon consideration of all the evidence of record and of the matters discussed above, it is our conclusion that the application should be granted in the form set forth below. We further conclude that applicant has adequately established its fitness, and that our decision will have no significant adverse effect on the environment, but rather should work to better the environmental quality.

Only a few matters remain for consideration. Grants of authority expressed in terms of mileage radii about a specified point are not favored by the Commission because of potential difficulties of enforcement engendered thereby, see *Glennon Transports, Inc., Extension—New York, N.Y.*, 78 M.C.C. 157, 159-160 (1958). Although applicant's present common carrier authority contains the 10-mile radius of Collingswood sought herein, it appears more appropriate, considering all the circumstances, to confine the grant of authority in this proceeding to points in Camden County, N.J., west of the New Jersey Turnpike. While this territory embraces all the apartment buildings which have supported the application, it does not require republication of the grant.

Finally, section 210 of the act applies only to the transportation of property by motor vehicle as both a common carrier and a contract carrier. Inasmuch as the grant of authority herein will be limited to the transportation of passengers and does not embrace express or other property, it is not necessary for us to approve the dual holding by applicant of a certificate and a permit from this Commission.

FINDINGS

We find that operation by applicant, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of passengers, between points in Camden County, N.J., west of the New Jersey Turnpike, on the one hand, and, on the other, Philadelphia, Pa., under a continuing contract or contracts with Somerset House Apartments, Towers of Windsor Park Apartments, New Parkview Village Apartments, and Cherry Hill Apartments, all of Camden County, N.J., will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's

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rules and regulations thereunder; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; that a permit authorizing such operation should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215, 218, and 221(c) of the act and with the Commission's rules and regulations thereunder, within the time specified in the order entered concurrently herein, an appropriate permit will be issued. An appropriate order will be entered.

BOARD MEMBER EATON not participating.

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United States Court of Appeals
for the Second Circuit

Hudson Transit Lines, Inc.,
Petitioner,

against

United States of America, The Interstate Commerce
Commission and Monsey Transportation Corp.,
Respondents.

**AFFIDAVIT
OF SERVICE
BY MAIL**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Frank Di Benedetto, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 40 Bay 37th Street, Brooklyn, New York
That on March 22, 1977, he served 2 copies of Brief
on and 1 copy of Appendix

Craig Lawrence, Esq., Harvey Strelzun, Esq.,
Asst General Counsel, 253 Broadway,
Interstate Commerce Commission, New York, New York, 10007.
Room 5137
Washington, D. C., 20523

Harry Grossman,
Chief Appellate Section,
Anti Trust Division,
Department of Justice,
Washington, D. C., 20423.

by depositing the same, properly enclosed in a securely-sealed,
post-paid wrapper, in a Branch Post Office regularly maintained by
the United States Government at 350 Canal Street, Borough of Manhattan,
City of New York, addressed as above shown.

Sworn to before me this
22nd day of March, 1977

Frank Di Benedetto
.....

John V. Desposito
JOHN V. DESPOSITO
Notary Public, State of New York
No. 50-0932350
Qualified in Nassau County
Commission Expires March 30, 1977